



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

EPA Region 5 Records Ctr.



349263

REPLY TO THE ATTENTION OF:
SR-6J

August 6, 2007

VIA CERTIFIED MAIL

Michael P. Hassett, P.E.
Senior Project Engineer 2
ARCADIS of New York, Inc.
6723 Towpath Road, Box 66
Syracuse, New York 13214-0066

**Re: King Highway Landfill Operable Unit 3 of the
Allied Paper Inc./Portage Creek/Kalamazoo River Site
City of Kalamazoo, Kalamazoo County, Michigan
Institutional Controls Plan
MDEQ Reference No. AOC-ERD-99-010**

Dear Mr. Hassett:

Thank you for your letter of August 3, 2007 in which you agree, on behalf of Georgia-Pacific, LLC ("Georgia-Pacific"), to develop an institutional controls plan for the King Highway Landfill, Operable Unit #3 ("KHL-OU3") of the Allied Paper, Inc./Portage Creek/Kalamazoo River Superfund site (the "Site"). The U.S. Environmental Protection Agency ("EPA") understands from your letter that, on or before September 17, 2007, ARCADIS will submit an institutional controls report that summarizes the results of an institutional controls study for the KHL-OU3, and that the study and report will comply with all relevant EPA guidance. EPA recognizes that Georgia-Pacific has already begun the process of evaluating whether all necessary institutional controls ("ICs") for the KHL-OU3 have been implemented, and that to facilitate the implementation of ICs, Georgia-Pacific may acquire certain property associated with the KHL-OU3 from the Michigan Department of Transportation ("MDOT") and/or the City of Kalamazoo. EPA is willing to discuss with Georgia-Pacific what additional time may be necessary to complete the IC study if such property acquisition is to occur.

As you know, the IC study will be used by EPA as part of its current review of the remedial action for the KHL-OU3, which is being conducted pursuant to Section 121 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9621. Section 121 of CERCLA mandates that, no less often than every five years, EPA must review remedial actions where hazardous substances, pollutants or contaminants remain in

place to assure that human health and the environment is being protected by the remedial action.

Because the remedy selected for the KHL-OU3 allowed certain waste to remain in place, and did not allow for unlimited use and unlimited exposure, the Record of Decision for the KHL-OU3 ("ROD") required that deed restrictions limiting future land use be imposed. Georgia-Pacific implemented the remedial action for the KHL-OU3 pursuant to an Administrative Order by Consent for Response Activity ("Consent Order") (AOC-ERD-99-010), signed in August 1990. The Consent Order required that, subsequent to completion of construction of the landfill, a restrictive covenant limiting the use of the KHL property would be recorded with the Kalamazoo County Register of Deeds. EPA believes that the restrictive covenant required by the Consent Order may never have been recorded. Other ICs may have been implemented by governmental entities since the ROD. In any event, EPA believes that the long term protectiveness, effectiveness and integrity of the remedy depend on implementation of and compliance with appropriate ICs. The objectives of the ICs are: (a) to restrict unacceptable exposures to hazardous substances located at the KHL-OU3, including hazardous substances in groundwater; (b) to assure that the use of the KHL-OU3 is consistent with the exposure assumptions and control measures required in the ROD; (c) to prevent damage or disturbance of any element of the remedial action constructed at the KHL-OU3; and (d) to provide a right of access to the Michigan Department of Environmental Quality ("MDEQ") to monitor and conduct response activities.

EPA recommends that, as Georgia-Pacific evaluates the appropriate ICs for the KHL-OU3, it review the Declaration of Restrictive Covenant and Environmental Easement that was recorded with the Allegan County Register of Deeds on March 25, 2005 for the 12th Street Landfill, Operable Unit #4 of the Site. EPA currently believes that any Declaration of Restrictive Covenant and Environmental Easement for the property(ies) comprising the KHL-OU3 should include provisions substantially similar to the following (based substantially but not entirely on the restrictions in place at the 12th St. Landfill Operable Unit):

Declaration of Land Use or Resource Use Restriction

1. The owner shall prohibit all uses of the property that are not compatible with the property's zoned industrial land use designation, the limited industrial land use category under Section 20120a(1)(i) of Part 201, Environmental Remediation, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended, MCL 324.20101(0) *et seq.* ("NREPA"), or other use that is consistent with the assumptions and basis for the cleanup criteria developed pursuant to Section 20120a(1)(i) of the NREPA. Cleanup criteria for land use-based response activities are located in the Government Documents Section of the State of Michigan Library.

2. The owner shall prohibit use of the property or portions thereof, for any of the following purposes:

- (a) A residence, including any mobile home or factory built housing, constructed or installed for use as residential human habitation;**

- (b) A hospital for humans.**
- (c) A public or private school for persons under 21 years of age.**
- (d) A day care center for children.**
- (e) Any purpose involving residential occupancy on a 24-hour basis.**
- (f) Any other use that would disturb or penetrate the landfill cover or erosion control system as set forth in the ROD.**

3. The owner shall prohibit activities on the property that may result in exposures above levels established in the ROD. These prohibited activities include:

- (a) Any excavation, drilling, penetration or other disturbance of the surface or subsurface soils on the Property except as necessitated for compliance with the operation and maintenance plan or conducted in accordance with any work plan approved or modified by the MDEQ, after review by EPA. All excavation, drilling, penetration or other disturbance of the surface or subsurface soils on the property must be conducted in accordance with a health and safety plan that complies with the Occupational Safety and Health Act of 1970, 20 C.F.R. 1910.120, and the Michigan Occupational Safety and Health Act;**
- (b) Any construction of buildings on the property unless plans are submitted to and approved by the MDEQ, after review by EPA. Any new construction must satisfy the indoor air inhalation criteria of Part 201.**

4. Unless MDEQ, after consultation with EPA, so requires, the owner shall prohibit the construction of any extraction or injection wells on the property, and shall prohibit the extraction of groundwater from, or injection of fluids into, any water-bearing aquifers at the property.

5. The owner shall prohibit activities on the property that may interfere with any element of the ROD, including the performance of operation and maintenance activities, monitoring, or other measures necessary to ensure the effectiveness and integrity of the remedy.

6. The MDEQ may require modifications to the restrictions contained in this Restrictive Covenant as necessary to assure the integrity and effectiveness of the remedial action required under the ROD or assure the protection of the public health, safety, welfare and the environment.

7. The owner shall comply with the applicable requirements of Section 20107a of the NREPA and Part 10 of the Part 201 Administrative Rules.

8. Permanent Markers. The Owner shall not remove, cover, obscure, or otherwise

alter or interfere with the permanent markers placed on the property pursuant to the ROD. The owner shall assure that the markers are readily visible and shall keep vegetation and other materials clear of the permanent markers.

9. Contaminated Soil Management. The owner shall manage all soils, media and/or debris located on the property in accordance with the applicable requirements of Section 20120c of the NREPA; Part 111, Hazardous Waste Management, of the NREPA; Subtitle C of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 *et seq.*; the administrative rules promulgated thereunder; and all other relevant state and federal laws.

Environmental Protection Easement

10. Access. The Owner shall grant to MDEQ, and its assigns, an irrevocable and continuing right of access to enter the property at all reasonable times for the purpose of:

- (a) Overseeing and/or implementing the remedial action required in the ROD, including but not limited to installation of a landfill cover system that complies with the relevant portions of Part 201 of the NREPA and conducting any necessary inspection and repair of the capped areas;
- (b) Verifying any data or information submitted to MDEQ and/or EPA, and determining and monitoring compliance with the ROD and its implementing Statement of Work;
- (c) Verifying that no action is being taken on the property in violation of the terms of this instrument or of any federal or state environmental laws or regulations;
- (d) Monitoring response activities at the KHL-OU3 and at the Site and conducting investigations relating to contamination on or near the Site, including, without limitations, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;
- (e) Conducting periodic reviews of the response activities at the property and at the Site, including but not limited to, reviews required by applicable statutes and/or regulations; and
- (f) Implementing additional or new response activities if MDEQ, after consultation with EPA, determines:
 - i) that such actions are necessary to protect public health, safety, welfare, or the environment because either the remedial action has proven to be ineffective or because new technology has been developed which will

accomplish the purposes of the remedial action in a significantly more efficient or cost effective manner; and,

ii) that the additional or new response activities will not impose any significantly greater burden on the property or unduly interfere with the then existing uses of the Property.

Other provisions of the 12th St., Operable Unit #4 Declaration of Restrictive Covenants and Environmental Easement may also be appropriate at KHL-OU3, *e.g.* the provision requiring the owner to provide notice to the MDEQ and EPA of the owner's intent to convey any interest in the property fourteen (14) days prior to consummating the conveyance.

IC Study and Report requirements

As noted above, EPA understands that ARCADIS will conduct the IC study and prepare the IC report in accordance with relevant EPA guidance. The purpose of the information provided below is to summarize the goals of an IC study and provide you with information regarding the standard contents of an IC report.

The goals of the IC investigation/study are: a) to evaluate whether institutional controls currently exist that adequately implement the objectives/performance standards described above; b) to identify and recommend any corrective measures to existing ICs necessary for their effectiveness; and c) to recommend any new or additional ICs necessary to achieve and maintain the objectives/performance standards described above.

An IC study should:

1. Demonstrate that existing proprietary controls have been properly recorded and are free and clear of all liens and encumbrances.

Such a demonstration shall include: a) a title insurance commitment using ALTA Commitment form 1982 as amended "for information only purposes" by a title company; b) copies of documents referenced in the title commitment; c) copies of the existing proprietary controls showing the recording stamp; d) copies of encumbrances, utility right of ways, leases and subleases impacting restricted areas; e) map and GIS information that identifies parcel numbers and boundaries of current encumbrances (such as utility easements) that impact restricted areas; and f) copies of subrogation agreements for encumbrances.

2. Demonstrate that existing proprietary controls were signed by a person or entity that owned the property at the time of signature.

3. Demonstrate that governmental controls are currently in effect.

Provide a current, dated and official copy of existing governmental controls (zoning ordinances,

statutes, etc.) if applicable, that implement the IC objectives. Discuss any sunset provisions in the governmental control.

4. Evaluate whether existing controls cover the entire area that needs to be restricted.

a. Discuss what information was used to depict the restricted area covered by the control. Is the restricted area and control based on reliable and up to date information, data and maps?

b. Provide map and GIS information regarding each area subject to existing controls, including areas where groundwater restrictions apply.

c. Provide map and GIS information of the legal description covered by an existing restrictive covenant or other proprietary control, and/or areas regulated by governmental controls; and

d. Provide maps and GIS that overlay the information of 4.b and 4.c.

All maps and GIS information must identify: site boundaries, streets, property ownership and assessors parcel numbers or other plat or survey information. Identify the accuracy of the GIS coordinates (*i.e.* within 0.01 feet). Format the GIS coordinates into an ESRI polygon-shape file. The shape file shall be projected into the UTM, NAD 83 projection system. Please identify the UTM zone. Provide an attribute name in the shape file for each polygon submitted. For example: "site boundary", "residential use prohibited", "groundwater use prohibited" and "interference with landfill cap prohibited."

5. Assess Objectives, Restrictions and Performance Standards of the Institutional Controls.

Discuss whether all IC objectives/performance standards/restrictions are clearly stated in the control.

6. Assess monitoring and compliance with Institutional Controls.

a. Discuss how, when and by whom compliance with the institutional controls is monitored. Discuss whether the results of the IC monitoring are routinely and promptly shared with EPA and MDEQ. Discuss whether there are measures in place to ensure that modifications to the restriction require EPA and the State approval. Does EPA and/or the State have a Memorandum of Understanding with the governmental entity? Discuss whether the property is being used in a manner consistent with the restrictions. Summarize results of site inspection and interviews with owners, lessees and other holders of property interests. Are owners, lessees and other holders of property interests aware of and complying with the restrictions?

b. Where can information be obtained about the governmental control (ordinance, code)?

How do affected parties such as homeowners, contractors and resource users obtain information about the governmental control? Are affected parties and resource users aware of and understand the restrictions described above? Have there been breaches of use restrictions described above. If so, how were they addressed by the governmental agency?

7. Discuss effectiveness of Institutional Controls.

Discuss whether the proprietary controls "run with the land" (*i.e.* restrictions are binding on subsequent property owners) under applicable state law.

Assess whether the controls are effective in the short term in maintaining the objectives/restrictions/performance standards of the ICs. Assess whether the control will be effective in the long term in maintaining the objectives/restrictions/performance standards. Discuss whether existing ICs are preventing exposure. Discuss whether land and/or resource use has changed since execution of the ROD. Is current or expected land use consistent with the city or county master plan? Does the property owner have any plans to sell or transfer the property? Are there any new developments, either constructed or planned, in the area? Are there any new construction permits pending? If so, what are the plans regarding property's ICs? Discuss how the current land and resource uses relate to exposure assumptions and risk calculations. Discuss whether there are any unintended consequences resulting from the use of a particular restriction.

8. Recommendations

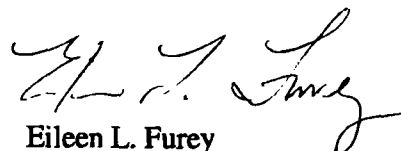
Propose any corrections to existing institutional controls that are necessary to ensure that appropriate land and groundwater use restrictions are implemented correctly, are maintained and will be protective in the short term and the long term. Propose controls for remaining areas that do not support unlimited use and unrestricted exposure but are not covered by existing controls and include a title commitment for any proposed proprietary control. Propose subrogation agreements for any encumbrance that impacts restricted areas. Propose monitoring requirements and modifications to any operation and maintenance plan to ensure that ICs are maintained and complied with in the short term and in the long term. The monitoring plan must include a schedule and an annual certification to EPA that ICs are in place and remain effective.

Again, thank you for your cooperation in this important effort. If you have any questions concerning this letter, please contact either of the undersigned (Eileen Furey at 312-886-6795 or Shari Kolak at 312-886-6151).

Sincerely,



Shari Kolak, RPM
Superfund Division



Eileen L. Furey
Office of Regional Counsel

cc: Keith Krawczyk, MDEQ
Mellonie Fleming, GP

bcc: Tom Marks, Remedial Enforcement Specialist, SR-6J
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